IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12308 of 1994

For Approval and Signature:

HON'BLE MR. JUSTICE ANANT S DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AV JASANI TB HOSPITAL STAFF UNION

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 12308 of 1994

MR HJ NANAVATI for Petitioner No. 1

MR K.T. Dave, AGP for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2-3

MR HARESH H PATEL for Respondent No. 4

CORAM : HON'BLE MR. JUSTICE ANANT S DAVE

Date of decision: 30/11/2004

ORAL JUDGEMENT

1. This petition under Article 226 of the

Constitution of India challenges the legality and validity of the order dated 29th July 1994 passed by the respondent No.1 and the consequential action of the respondent No.4, whereby, the benefits in the form of 'T.B. Risk Allowance', which were given to the Members of the petitioner-Union, who were enjoying the said allowance since 1964, have been discontinued, without affording any opportunity of being heard to the members of the petitioner-Union.

2. It is the say of the petitioner that it is a Registered Union incorporated under the provisions of the Trade Unions Act, 1926, having Registration No.G.4947, dated 7th April 1992. The petitioner-union has taken up the cause of its members and employees working at A.V. Jasant T.B. Hospital, at Rajkot.

2.1 The petitioner has contended that tuberculosis is a highly contagious disease and, due to this fact, the hospital paid 'T.B. Risk Allowance' to the staff every month and this practice was in vogue since 1964 and, therefore, the impugned action of the respondents to discontinue the same without hearing the staff members of the hospital and the members of the petitioner-union is violative of principles of natural justice and, in addition to that, even recovery is also initiated pursuant to the cancellation of 'T.B. Risk Allowance' as per the said decision.

3. During pendency of the writ petition, the Court has, by order dated 28th October 1994, stayed the recovery part, and Rule was also issued making it returnable on 29th November 1994, and the said interim relief continues till today.

4. According to the petitioner, 'T.B. Risk Allowance' was being paid at the rate of 6.25% of the basic salary of the concerned employee. However, in 1988, it was revised from 6.25% to 8% of the basic pay plus dearness allowance and the said 'T.B. Risk Allowance' was being paid uninterruptedly to the staff of the said T.B. Hospital till the impugned order dated 29th July 1994 came to be passed. In pursuance of the impugned order dated 29th July 1994, the State Government directed the respondent No.4 to start recovery of the amount paid and, therefore, the said recovery part is also challenged in this petition.

5. Affidavit-in-rely is filed by Dr.K.R. Pujara, Medical Officer, Commissioner of Health, Gandhinagar, inter alia, contending that, earlier, the Government had

passed Resolution dated 17th February 1987 and clarified the Government Resolutions dated 17th March 1964 and 17th August 1978 and stated that in Rule 10, Item No.1, the Institution will fix the salary of its employee as per its wish, but, if the salary which has been fixed by the Institution is more than the government employee, in such case only, the Government will pay the expenditure as per the salary of the government employee, and not more than that. If the Institution wants to give more salary than the government employee, in such circumstances, it should be borne by the Institution and, for that, the Government will not pay excess salary expenditure and the State Government has taken a decision subsequently to cancel 'T.B. Risk Allowance' and, consequently, ordered recovery thereof.

6. During the course of arguments, the learned advocate, Mr. H.J. Nanavati, appearing for the petitioner, has invited the attention of this Court to the Oral Judgment dated 12th October 2004 passed by this Court (Coram: Akil Kureshi, J.), in Special Civil Application No.12669 of 1994, which is an identical petition. According to the learned Assistant Government Pleader, the Court has relied upon the Circulars dated 7th March 1964, 17th August 1978 and the Government Resolution dated 17th February 1987. In paragraph 7 of the judgment and order, the Court has given cogent reasons while interpreting those circulars and the effect thereof. Paragraphs 7, 8 and 9 of the said judgment and order read as under:

> "7. It is not in dispute that since many years the staff of the respondent No.5 hospital was receiving T.B Risk Allowance. It is also not in dispute that for decades together the Government was paying grant to the respondent hospital of the said amount to be paid to the staff by way of T.B Risk Allowance. In the circular of 1964, the said expenditure is held admissible for the grant. In the subsequent Circular dated 17th August, 1978 also T.B Risk Allowance is specifically made admissible for payment of grant by way of special concession to T.B institutions. It is not the case of the Government that the said Circular dated 17th August, 1978 has been withdrawn. What is suggested is that by subsequent circular dated 17.2.1987, certain changes have been made in the earlier Circular dated 17th of August, 1978. From the preamble of the said Circular dated 17th February, 1987, it can be seen that

certain changes have been made keeping in mind the representations of the Federation of Charitable Hospitals in the State of Gujarat. In the said Circular it is specifically provided that private institutes are free to engage nursing and other staff and prescribe the pay-scales to be granted to them. However, for the purpose of computation of grant to be paid to such institutes, such pay and allowances if they are higher than the pay-scales admissible to Government servants holding equivalent post, the pay-scales of the Government servants only shall be taken into account.

It is this change introduced pursuant to the Circular dated 17.2.1987 which is sought to be pressed in service by the respondents to contend that since the Government servants working in T.B hospitals are not given T.B Risk Allowances, the respondent No.5 hospital cannot receive grant for the said expenditure even if this allowance is paid to its employees. In my view the said reading of the Government Resolution dated 17.2.1987 is not correct, The condition in question only provides that even in case private hospitals are offering pay and other allowances to its employees higher than the pay-scale available to Government servants holding similar posts, for the purpose of paying grant-in-aid, the pay-scale of the Government servants only shall be taken into account. Neither this condition, nor any other modification introduced by Circular dated 17.2.1987 modifies or in any other manner deletes entry No.37 in the Government Resolution dated 17th August, 1978, by which in case of T.B. institutions expenditure on T.B. Risk Allowance paid to the staff is admissible for the purpose of receiving grant-in-aid. Thus, only if after calculating the T.B Risk Allowance the employees end up receiving pay and allowances all put together higher than the Government servants holding equivalent posts, that the said condition contained in Government Resolution dated 17.2.1987 would come into picture. Without verifying and comparing the pay and allowances received by the employees of the respondent No.5 with those of Government servants holding equivalent posts, it is not possible for the Government to discontinue the

T.B. Risk Allowances on the ground that Government servants holding similar posts are not receiving such specific allowance.

8. In the petition, the petitioner has contended that the employees of the respondent No.5 are drawing pay far less than similarly situated Government servants. However, for want of sufficient material it is not possible for this Court to decide the veracity of the statement. Suffice it to say, the correct and conjoint reading of the Circular produced on record would permit the Government to discontinue paying grant to the respondent No.5 hospital under the head of T.B. Risk Allowance, only if the pay and allowances received by the staff of the respondent No.5 hospital exceeds the pay and allowances received by Government servant holding equivalent posts and not otherwise.

9. In the result, the impugned order dated 29.7.1994 is quashed and set aside and the respondents Nos. 1 to 4 are directed to reconsider the issue of release of grant-in-aid in favour of respondent No.5 for its employees under heading of T.B Risk Allowance in light of the findings and observations made hereinabove and communicate the decision taken thereon to the petitioner within a period of 8 weeks from the date of receipt of a copy of this order. If the petitioner wishes to produce any material on record to enable the Government to come to a proper conclusion, the petitioner shall be at liberty to do so."

I am in total agrement with the findings given by the Court in its Oral Judgment dated 12th October 2004 passed in Special Civil Application No.12669 of 1994.

7. Accordingly, the impugned order dated 29th July 1994 is quashed and set aside. The respondents Nos.1, 2 and 3 are directed to reconsider the issue of release of grant-in-aid in favour of the respondent No.4 for its employees under the heading of 'T.B. Risk Allowance', in light of the observations and findings made in paragraphs 7, 8 and 9 of the aforesaid judgement, which are reproduced hereinabove, and to communicate the decision taken thereon to the petitioner within the period of eight weeks from the date of receipt of writ of this order. It is open to the petitioner to produce relevant

material on record, so as to enable to the respondents to arrive at a just and proper finding and conclusion. The respondents Nos. 1, 2 and 3 are also directed to take subsequent steps pursuant to the decision that may be taken by the respondents after considering the relevant material produced by the petitioner.

8. Accordingly, the respondent No.4 has received grant-in-aid since 1964 under the heading of 'T.B. Risk Allowance' and it was continued despite the Circular dated 17th February 1987. It is pertinent to note that 'T.B. Risk Allowance' was given to the respondent on its own and the employees of the respondent No.4 are not at fault. Under such circumstances, the Government cannot be permitted to withdraw the benefits given to the employees with retrospective effect particularly in view of the fact that the employees, who discharge their duties in T.B. Hospitals, are prone to vagaries of contagious disease like T.B. and, therefore, they cannot be compelled to repay the said amount received by them many years back. In this view of the matter and particularly in view of the fact that no opportunity of hearing was given to the petitioner before effecting the recovery, it would not be proper to permit the Government to withdraw the said benefit with retrospective effect and to cause pecuniary loss to the members of the petitioner-union. In view of the exercise undertaken hereinabove, the respondents are directed that, even if the respondent-State Government comes to the conclusion that the respondent No.4 is not entitled to the grant for 'T.B. Risk Allowance' paid to the staff, the respondents-Authorities are hereby precluded from effecting any recovery of the amount already paid.

9. With the aforesaid observations and directions, this petition is allowed. The order dated 29th July 1994 passed by the respondent No.1 is quashed and set aside. Rule is made absolute to the aforesaid extent with no order as to costs.

(Anant S. Dave, J.)
(swamy)